United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-7367

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-7367

ROBERT P. KOCH, KEVIN P. RYAN, JOHN J. WILSON, Captains of Police, PHILIP BOHRER, JAMES L. JUDGE, WILLIAM WIESE, Lieutenants of Police, RICHARD BECK, JOSEPH BIRBIGLIA, CHARLES CASEY, JAMES CLARK, EDWARD EASTWOOD, JOHN GALANTINI, RONALD GOULDNER, REGINALD GREENIDGE, RUSSLAN HOFFMAN, JAMES KEELS, JOHN MURRAY, LAWRENCE PALLADINO, Sergeants of Police, New York City Transit Authority,

Plaintiffs-Appellants,

—against—

DAVID L. YUNICH, Chairman and Chief Executive Officer, New York City Transit Authority, and ALPHONSE E. D'AMBROSE, Personnel Director and Chairman of the Civil Service Commission, City of New York,

Defendants-Appellees.

REPLY BRIEF FOR APPELLANTS

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REPLY BRIEF FOR APPELLANTS

Reply is made briefly to two points urged by counsel for the Appellees in their briefs: (I) The effect of comity, or res judicata, of determinations made by a State court in a proceeding seeking relief purely on grounds of the provisions of State statutes, and not on separate and different grounds under provisions of the Federal Constitution and statutes, when the State proceeding was instituted subsequent to the judgment of dismissal by the Federal District Court that is solely under review in this Court [answering Appellee Yunich's Brief, p.8-10, and Appellee D'Ambrosio's Brief, p. 3, footnote *]; and (II) The substantial nature of the Federal question of the deprivation of employment, and other benefits, of State employees without pre-termination hearing [answering Appellee Yunich's Brief, p. 10-17, and Appellee D'Ambrosio's Brief, p. 4 - 12].

I

The judgment of the District Court under review finally dismissing appellants' claims under 42 U.S.C. §§ 1983, 1985(3) and 28 U.S.C. §§ 1343(3), 2201, 2202, 2281, 2284, was made and entered substantially before the commencement of the proceeding in the State Court brought under Article 78, N.Y.CPLR for relief solely under statutes of the State. Application to expedite appeal from that judgment to this Court had also been made and disposed of prior to such commencement. The sequence is as follows:

¶ June 14, 1975. Order to show cause signed by United States District Judge Orrin G. Judd and made returnable before him at 11 A.M., June 20, 1975, Courtroom 11, United States Courthouse for the Eastern District of New York, for relief demanded by appellants upon their verified complaint under 42 U.S.C. § 1983 (21*).

¶ June 20, 1975. Judgment dismissing the complaint was made and entered by United States District Judge Walter Bruchhausen, following oral argument in his Chambers at the United States Courthouse for the Eastern District of New York (24).

¶ June 20, 1975. Notice of Appeal (25) filed and served and record on appeal certified and delivered to this Court (1).

¶ June 23, 1975. Appendix on Appeal served and filed in this Court (1-25). Application for expedition of appeal filed in this Court.

¶ June 25, 1975. Three Judge panel of this Court consisting of United States Supreme Court Justice [ret.] Tom Clark, and Circuit Judges Walter R. Mansfield and William Hughes Mulligan denied application for forthwith appeal with leave for forthwith renewal of same should threatened administrative action take place.

¶ June 27, 1975. Order to show cause with preliminary injunction signed by State Supreme Court Justice Samuel

*Numerals in parentheses ( ) throughout are to pages of the APPENDIX.

Welcome based upon the verified petition of appellants seeking relief upon the basis solely of State statutes and State constitutional provisions. This order was made returnable in the part of the State court designated for dispositions based upon questions of law and not involving trial of issues of fact, either with or without a jury, namely, Special Term, Part I, on June 30, 1975, the scheduled date of demotion of appellants.

¶ June 30, 1975. Appellees served and filed an affidavit in opposition to appellants' petition, to which was annexed a copy of the judgment of the United States District Court dismissing the complaint herein (24), the notice of appeal therefrom (25), and various affidavits of appellees in connection with appellants' application for expedition of their appeal to this Court.

¶ June 30, 1975. Upon oral argument in Special Term, Part I, of the State Supreme Court, Justice Abraham J. Multer presiding, the Court denied appellees' application to vacate the preliminary injunction of the Court against appellees' proposed action to demote the appellants on June 30, 1975, and referred them to the appellate tribunal for that relief sought on that day.

¶ July 7, 1975. Appellees served and filed a motion to dismiss"the petition herein on the grounds that it does not state facts sufficient to constitute a cause of action, or to entitle the petitioners to the relief prayed for or to any part thereof, or to any other relief," in Special Term, Part I of the State Supreme Court.

¶ July 24, 1975. In memorandum [APPENDIX, post], the State Supreme Court per Justice Abraham J. Multer established the the law of the case for the proceeding in the State court, after oral argument in open court and submission of briefs by the adversaries, when upon appellees' motion to dismiss appellants' petition for legal insufficiency - necessarily admitting the facts alleged in the verified petition for determination of the question of law - the Court held:

> "The respondents' cross motion to dismiss for insufficiency is denied. If nothing else, petitioners seek a declaratory judgment and make out a cause of action therefor."

¶ August 19, 1975. Appellee YUNICH served a verified answer to appellants' petition -now sustained by the State Supreme Court to "make out a cause of action" - denying virtually every allegation contained in the twenty-seven paragraphs, with inconsequential exceptions.

¶ September 4, 1975. Order made and entered by the State Supreme Court per Justice Abraham J. Multer directing that "respondents' Cross-Motions to dismiss are denied". The Court also directed both respondents to submit a verified answer to the petition and that petitioners then add this case to the calendar of Special Term, Part III of the Court, for non-jury trial of issues of fact.

¶ September 17, 1975. Appellee YUNICH repeated his motion to dismiss the petition "on the grounds * * * (2) that the petition fails to state a cause of action and lacks merit." The notice of motion directed that the same be returned to Special Term, Part III of the Court on September 22, 1975, but the Court amended that direction to make it returnable in Special Term, Part I of the State Supreme Court on September 19, 1975. An affidavit sworn to in support of the motion on September 17, 1975, affirmed, notwithstanding the verified answer served on August 19, 1975, denying virtually every allegation contained in appellants' verified petition in the State court:

> "[T]hat there is no issue of fact in this proceeding which requires a trial; * * *" [par."2"].

That affidavit of appellee, notwithstanding appellees' motion in Special Term, Part I, of the State court to dismiss "the petition herein on the grounds that it does not state facts sufficient to constitute a cause of action, or to entitle the petitioners to the relief prayed for or to

"any part thereof, or to any other relief," made on July 7, 1975, and flatly rejected by the State court in memorandum of July 24, 1975 and order of September 4, 1975, both by State Supreme Court Justice Abraham J. Multer, also affirmed:

> "7. No prior application has been made for the relief herein requested."

Once again, among other papers, the appellee YUNICH appended the judgment of the District Court below (24) under review by this Court and rendered prior to any proceedings in the State court.

¶ September 26, 1975. State Supreme Court Justice Charles R. Rubin, sitting in Special Term, Part III of the Court designated by the Appellate Division of the Supreme Court for disposition of cases involving issues of fact for non-jury trial, dismissed the proceeding as a matter of law.

[i]

The issues both raised and disposed of in the proceeding in the State court, first by Justice Multer who established the law of the case favorable to the appellants and then by Justice Rubin in flat contradiction to the law of the case, were entirely different from the issues raised and disposed of in the District Court below and under review in this Court. All of the issues in the State proceeding were based upon State constitutional and statutory provisions, and none of them upon Federal constitutional and statutory provisions. Each and every issue in the Federal action arose under Federal constitutional and statutory provisions, and none under any State provision. In the State proceeding, brought under Article 78 of the New York Civil Practice Law and Rules, several State constitutional and statutory provisions were involved, with nothing comparable in the Federal action or under the Constitution or statutes of the

United States:

(a) Chapter 834, Laws of 1940, requiring pre-termination hearing before removal of policemen under the authority of the State from their permanent positions. In Matter of Healey v. Bazinet, 291 N.Y. 430 (1943), the highest State court nullified the removal of a policeman without the pre-termination hearing prescribed by this statute in a non-disciplinary situation in which his position had been abolished by law. This had been the law in the State for more than a generation until Justice Rubin overruled the highest court: "The right to a hearing prior to dismissal or demotion of a police officer, as provided in [the statute in question] is inapplicable to this case. Such hearings are required where one is removed for cause rather than for economic reasons * * *." No claim under the State statute in question has been raised in the Federal action under review.

(b) State Constitution, Art. 5 § 6, requiring as a basis merit and fitness ascertained by competitive examination for holding public employment under the authority of the State. Justice Rubin, explicitly referring to this provision held that the action challenged "cannot be deemed in violation of that constitutional provision." Clearly a Federal court lacks jurisdiction to determine violation of such provision contained in a State constitution that has no parallel in the Constitution or statutes of the United States, and accordingly no claim for such determination has been made in the Federal action under review.

(c) State Constitution, Art. 5 § 7, prohibiting diminution and impairment of benefits in a pension and retirement system of the State. Again, this provision - claimed to have been violated in the State proceeding - is beyond the pale of Federal jurisdiction for determination in the action under review by this Court, although disposed of in a catch-all reference as "other claims raised in the petition" by Justice Rubin.

Other issues raised in the State proceeding, namely, violation by the challenged action of due process and equal protection constitutional provisions are governed by comparable State and Federal language in their respective Constitutions. In neither memoranda of the State court is any reference made to any provision of the Federal Constitution or of any Federal statute, or, indeed, to any Federal case. Even if it could be assumed that the State court dispositions were based upon its construction of Federal constitutional provisions, no Federal court is foreclosed from making a fresh, independent and different construction of such provision, unhampered by any considerations of comity, res judicata, full faith and credit or any requirement that a Federal tribunal apply as governing law a State rule. Cf. Erie Railroad Co. v. Tompkins, 304 U.S. 817 (1938). A State construction of the identical Federal constitutional provision may validly be different from that of a Federal court, at least when the State rule places greater restriction upon governmental action and accords a wider berth to individual rights against such action. For example, under the Fourth Amendment and the rule of exclusion constitutionally imposed upon State action, the State of New York insists upon suppression of narcotics seized upon search of a person after a valid arrest for a traffic infraction, People v. Marsh, 20 N.Y.2d 98 (1967), but the Federal rule holds such evidence admissible in a State proceeding. Gustafson v. Florida, 414 U.S. 260 (1973). In Air Pollution Variance Bd. v. Western Alfalfa Corp., __U.S. __, 94 S.Ct. 2114, 40 L.Ed.2d 607 (1974), a unanimous Court, relying upon its long-standing "open fields" doctrine, held admissible

evidence seized in a warrantless search, under Hester v. United States, 265 U.S. 54 (1924), but a few weeks later the highest court of the State held such evidence inadmissible under comparable circumstances. People v. Spinelli, 35 N.Y.2d 77 (1974).

Accordingly, appellants have refrained from any attempt to dispossess this Court of the power conferred upon it by Congress to review determinations made by a lower Federal tribunal, by insistence upon any doctrine of law of the case announced by a State court upon proceedings commenced after the judgment of the Federal court under review. Evarts Act, Act of March 3, 1891, 26 Stat. 826. This is so despite the fact that the law of the case in the State proceeding was validly pronounced by the State tribunal in the memorandum of the State Supreme Court per Justice Multer upholding the claims of appellants, as a matter of law, on July 24, 1975, and the judgment entered on these claims on September 4, 1975. Besides the contrary determination, the only difference between that pronouncement of the law of the case and the subsequent determination by Justice Rubin was twofold: (a) The judgment of Justice Multer was based upon sworn facts - identical to those alleged under oath in the Federal complaint under review - that were admitted to be true only by the operation of law necessarily involved when a motion to dismiss based upon insufficiency is before the court; the determination of Justice Rubin was based upon the identical facts, but this time sworn to be true by the lawyer for one of the appellees. (b) The judgment of Justice Multer was rendered

in a setting in which no law of the case had been pronounced by a co-ordinate judge of the identical tribunal upon the identical proceeding in the identical courthouse; the determination of Justice Rubin constituted a direct attack upon the judgment of Justice Multer, a prerogative reserved under State law for the multiple membership of a duly designated appellate tribunal.

[ii]

In Eck v. United Arab Airlines, Inc., 360 F.2d 804 (1966), this Court declined to "decide the vexing question whether principles of res judicata oblige us to respect this state-court determination, for the appellant has not here contended that we are so bound by the [New York State] Court of Appeals decision, * * *." Id. at 809. This Court took account of its decision in Goldfarb v. Wright, 135 F.2d 188 (1943), relied upon by appellee YUNICH [brief p. 9] and involving mandatory constitutional application of the State rule in Federal actions under Erie v. Tompkins, ante, but still observed [id. at 809, n.12]:

> "The question we here leave open is whether we similarly should respect a state-court determination that, under traditional concepts, is not a final state-court determination that, under traditional concepts, is not a final state-court judgment subject to review by the U.S. Supreme Court under 28 U.S.C. § 1257 [citing cases]."

Self-evidently, the determination of Justice Rubin is not only not a "final state-court determination" that is "subject to review by" the Supreme Court of the United States, but also is one rendered in flagrant disregard of the principle of res judicata that appellees urge this Court to honor. The opinions of Mr. Justice Holmes, relied upon in the brief of appellee YUNICH (page 9), actually sustain Federal court intervention contrary to State judicial determinations.

II

For almost seventy years, suspension or demotion upon abolition of a civil service position was under the formula of "the inverse order of original appointment on a permanent basis in the competitive service." Civil Service Law of 1909 § 75. In one of the many reenactments of that formula, chapter 283 of the Laws of 1972 [now Civil Service Law § 80(1)], the draftsman -inadvertently or otherwise - used the word "classified" instead of "competitive". There has been no State judicial construction whether the Legislature intended any change whatsoever in its historic formula. Based upon that reenactment, appellee D'AMBROSIO in an administrative order assumed that the historic formula of seniority in a permanent position had been scrapped and that a brand new formula of longevity on the public payroll had been substituted instead (20). The eighteen appellants - all superior officers in the New York City Transit Police - are adversely affected by proposed layoffs and demotions under this new administrative formula that significantly departs from the historic statutory standard. Under the new longevity on the public payroll formula, a captain of police who has held that position on a permanent basis for eight years is subject to demotion and layoff ahead of another employee who has held that position for only eight days, but who has accumulated greater longevity on the public payroll even in non-competitive positions unrelated to law enforcement. One-third of the appellant sergeants of police are black and members of a minority group who are penalized by the proposed

administrative action that discriminates against employees who more recently entered public service and have less longevity on the public payroll, but who have demonstrated superior merit and fitness, ascertained by competitive examination, in advancing more rapidly in the service. In this respect, the Federal question in this case presents both the cause of merit and fitness and that of disadvantaged minority groups. See De Funis v. Odegaard, 416 U.S. 310 (1974); Washington v. Davis, ___F.2d ___ (D.C. Cir., decided Feb. 27, 1975) [District of Columbia Metropolitan Police Department civil service examination alleged to have racially disproportionate impact on black applicants], cert. granted 44 LW 3179 (Oct. 6, 1975); Elrod v. Burns, 509 F.2d 1133 (7th Cir. 1974) [preliminary injunction granted on threats to discharge officer without pre-termination hearing in county sheriff's office], cert. granted 44 LW 3179 (Oct. 6, 1975).

C O N C L U S I O N

The order of the Court below dismissing the complaint should be reversed in all respects.

Respectfully submitted,

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NEW YORK LAW JOURNAL—Wednesday, July 30, 1975

Kings County

SUPREME COURT

SPECIAL TERM, PART 1

Justice Multer

SAMET v. ABRACEN; Florio v. Crompton—Orders signed.

KOCK v. YUNICH—Petitioners in this article 78 proceeding seek to prevent the respondents from demoting or dismissing them from their respective Civil Service positions. Respondents have cross-moved to dismiss.

Petitioners are Captains, Lieutenants, and Sergeants in the police force of the New York City Transit Authority, all having reached that status through competitive Civil Service examinations. The court, as well as every citizen of this city, is aware of the fical plight of our municipal government and the threatened and actual dismissal of various civil servants, including police officers, due to lack of funds. The petitioners herein fearing the effects of such measures, seek to prevent such actions as against them. They base their claim to retention of their positions on various portions of the United States and New York State Constitutions and various laws of this state.

The cross-motion to dismiss is based on an alleged failure to state a cause of action. It appears that none of the petitioners herein has actually been notified that he is about to be demoted or dismissed, and thus no determination of which petitioners can complain has been made. While it may be unfair to keep petitioners and other civil servants in a state of uncertainty as to their immediate future, no right to injunction can lie until the act to be enjoined has actually been officially threatened.

The fears of the petitioners, while perhaps based on valid assumptions, bolstered by recent news stories and statements of high city officials, may turn out to be groundless.

In any event, the issuance of a temporary injunction is inappropriate at this time. That is particularly so, since that is the ultimate relief sought herein. Proof of irreparable damage is a necessary prerequisite to petitioners right thereto. If and when improperly discharged or demoted, petitioners will be entitled to monetary damages.

The application for a temporary injunction is denied and the stay contained in the order to show cause is vacated. Respondents are directed to answer within ten days and the case will be added to the calendar of Special Term, Part 3, for Sept. 2, 1975 upon serving and filing a note of issue and paying the necessary fees.

The respondents' cross-motion to dismiss for insufficiency is denied. If nothing else, petitioners seek a declaratory judgment and make out a cause of action therefor.

The cross-motion to dismiss on the ground of another action pending for the same relief sought herein is captious. It is denied without prejudice to alleging that as a defense if and when the United States Circuit Court of Appeals reverses the District Court's dismissal of that action. Until then, there is no other action pending.

Settle order on notice.